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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number 309

■

IN THE MATTER OF SAM CATANZARO, JR.
Petitioner

■

**Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Third Circuit**

HAYDEN C. COVINGTON
Counsel for Petitioner



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Britannica, <i>Encyclopædia</i> (1942) Vol. 11, p. 53	16
Cooley, <i>Constitutional Limitations</i>	
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Holdsworth, <i>History of the English Law</i> , Vol. 9, pp. 108-125	16
Kent's Commentaries (Holmes, 12th ed.), Vol. 2, pp. 32-42	16
Lincoln, Abraham, <i>Voices of Democracy</i> (Government	
Printing Office, 1941), p. 11	34
Watson on the Constitution, Vol. 1, pp. 721-739	16, 21, 27
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SUPREME COURT OF THE UNITED STATES

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IN THE MATTER OF SAM CATANZARO, JR.

Petitioner



Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

To the Supreme Court of the United States:

The petitioner, Sam Catanzaro, Jr., presents this petition for writ of certiorari and shows unto the court as follows:

Summary of Matters Involved

1. Preliminary Statement.

The issues presented in this petition have neither been decided nor foreclosed by the opinion and judgment of the court in the case of *Falbo v. United States*, No. 73, October Term 1943, as will be disclosed in the statement, discussion and brief which follows. Prior decisions of this court relating to the ancient preroga-

tive writ of habeas corpus judicial review of the cause of restraint of a person by the government remains unchallenged by the decision in the *Falbo* case and give substance and merit to each of the questions presented on this petition for writ of certiorari so as to require this court to grant the writ and consider the questions presented. In fact, the *Falbo* decision has strengthened the right of petitioner to the writ of habeas corpus. This petition is stronger now than it was before the *Falbo* case was decided. If the *Falbo* decision be claimed to dispose of the questions here presented then reconsideration of the *Falbo* decision is urged.

2. Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals is reported in 138 F. 2d 100 and appears in the record at pages 10-14. There is a dissenting opinion by Judges Biggs and Maris. (R. 14-17)

3. Statutory Provisions Sustaining Jurisdiction.

Section 240 (a) of the Judicial Code, 28 U. S. C., s. 347 (a), amended by Act of February 13, 1925, supports jurisdiction of this court.

4. Statutes and Regulations Involved.

28 United States Code, sections 451, 453, 454, 461 and 464. 50 United States Code, 301-318 (Sections 5 (d) and 11 of the Act). Selective Service Regulations 601.5; 622.44; 633.1.

5. Constitutional Provisions Involved.

Clause 2 of Section 9 of Article 1 concerning writ of habeas corpus. Clause 3 of Section 9 of Article 1 prohibiting bills of attainder. Clauses 1-3 in Section 2

of Article 3 investing the judicial powers in the courts. Fifth and Sixth Amendments.

6. Questions Presented.

(a) Is the inalienable constitutional writ of habeas corpus available to test the unconstitutionality and invalidity of an order of an administrative agency petitioner refused to obey which is the basis of his restraint?

(b) Can this great constitutional writ of the people be withheld by the judiciary from petitioner as a penalty inflicted for his failure to obey the illegal order?

(c) Do the provisions of the Act and Regulations which require a man who is exempt from training and service under the statute to report for induction, surrender his civilian status and subject himself to severe military penalties as a condition precedent to judicial review, and which also penalize the petitioner upon trial in the district court for having failed to report for induction by withdrawing the defense to the indictment of the invalidity of the order, present such an extraordinary situation and unusual circumstance as to command the issuance of the writ of habeas corpus prior to trial to protect the rights of petitioner?

(d) Does the writ of habeas corpus lie to rescue the petitioner from a statutory trial in execution of an act of attainder so as to avoid certain punishment under the unconstitutional criminal sanctions clause of the Act?

(e) Does the writ lie to test, under the circumstances, the order of the board alleged to be in excess of authority of the board, contrary to the undisputed evidence, without support of substantial evidence,

made in violation of the due process clause of the Fifth Amendment and arbitrarily and capriciously?

(f) Is the criminal sanctions clause of the Selective Training and Service Act of 1940 unconstitutional and void because contrary to Section 9 of Article One and Article Three, of the United States Constitution and the Fifth and Sixth Amendments thereto, so as to require the issuance of the writ?

(g) Did the courts below illegally deny and suspend the writ of habeas corpus because petitioner failed to report for induction contrary to Clause 2 of Section 9 of Article 1 of the United States Constitution?

7. Timeliness.

The order and judgment of the Circuit Court of Appeals were entered on September 23, 1943. (R. 18) By orders of this court duly and timely made the date for filing the petition for writ of certiorari was extended to and including February 19, 1944. (R. 19)

8. History Showing How Questions Arose Below.

Petitioner was arrested under an indictment filed against him in the district court October 27, 1942, charging that he "feloniously and contrary to his said duty" did "fail, neglect and refuse to report and submit to induction for training and service in the military forces of the United States". (R. 1-2) Thereupon he duly applied for a writ of habeas corpus, which was filed in the district court on November 30, 1942. (R. 2-6) The judge of the district court refused to issue the writ as requested and ordered the petition dismissed. (R. 7-8) The ground for refusing the writ and dismissing the petition was "that the defendant still neglects and refuses to comply with the said order of induction".

(R. 8) The ultimate facts alleged and necessarily conceded to be true are, *inter alia*:

Petitioner duly registered under the Selective Training and Service Act of 1940 with Local Board No. 8 for Bergen County, New Jersey. In his questionnaire, duly and timely filed, he claimed and furnished proof that he was a regular and duly ordained minister of religion and claimed exemption from all training and service under the Act pursuant to its Section 5 (d). (R. 2-3) Since 1937 he has been preaching as an ordained minister of the Watchtower Bible and Tract Society as one of Jehovah's witnesses. His exempt status as a minister was established by documentary evidence duly filed with the local board which evidence consisted of a certificate of ordination, affidavits and statements duly signed by persons acquainted with the ministerial work done by petitioner. Such proof was conclusive and undisputed in any manner before the boards. (R. 4-5)

October 21, 1941, petitioner was classified in Class 1-H by his local board, which, on February 10, 1942, changed his classification to Class 4-E, from which he duly appealed. On March 20, 1942, the Board of Appeal arbitrarily penalized him for taking an appeal by changing him from Class 4-E to Class 1-A and ignoring and rejecting his claim for complete exemption as a minister of religion. An effort was duly made in writing to have the State Director and National Director to review the action of said boards and to appeal said classification, but they refused to exercise their discretion or take any action. On May 21, 1942, petitioner received notice to report for induction on June 1, 1942. He did not report for induction. (R. 3)

Petitioner charged the Selective Service System with illegal action and conduct. He claimed that the local and appeal boards refused to consider his claim and proof of complete exemption as a minister. He alleged further that they disregarded Opinion No. 14 of the National Director of the Selective Service System and refused to follow paragraph 5 thereof recommending that persons who occupy the relation to Jehovah's witnesses as does the petitioner are entitled to exempt classification as ministers of religion under Section 5 (d) of the Act. It was asserted that there was no evidence to support the classification given by the boards and that such action was contrary to the undisputed evidence, arbitrary and capricious, in utter disregard of petitioner's rights, gross abuse of power, unwarranted on the substantive facts before the boards, depriving petitioner of his liberty and rights without due process of law, contrary to the Fifth Amendment to the Constitution and discriminating against the free exercise of religion in violation of the First Amendment to the Constitution. (R. 4-5)

It was established that petitioner had been wrongfully and illegally charged with a violation of the criminal sanctions clause and the regulations under the Act and that he was wrongfully arrested and illegally detained. Further it was shown that he had exhausted all remedies open to him within the Selective Service System and "has been and will be denied the right to challenge, question or review the acts of Local Board No. 8 for Bergen County and Appeal Board No. 2 for the State of New Jersey in any manner except by a hearing on a writ of Habeas Corpus". (R. 5) The facts thus established extraordinary circumstances of a clear

and present danger of (1) irreparable injury from criminal penalties, (2) loss of his right to be heard in his own defense, and (3) loss of his liberty contrary to law, unless the court reviewed the illegal action of the boards by writ of habeas corpus. (R. 2-7)

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and seriously affect the life, liberty and rights of many thousands of persons who are exempt from all training and service under the Selective Training and Service Act. The interpretation placed on the Act by this court in the *Falbo* case has eliminated all defenses to the indictment that are based on the illegal action of the board. The denial of the right to be heard in this defense makes conviction and loss of liberty certain. If the government is permitted to pursue to completion the criminal proceedings by prosecution under the indictment, the petitioner is forced to undergo a trial by ordeal and suffer pains and penalties by bill of attainder with no chance to escape punishment.

Inasmuch as the *Falbo* decision did not deal with any problem other than the right to urge this challenge to the indictment that the order was void, which defense the court held was precluded, there remains for determination the question of whether Congress intended to withhold the review of the illegality of the board's orders upon an application for writ of habeas corpus, in the absence of plain, express and direct language denying power of review on habeas corpus. Did Congress by implication repeal the provisions of Sections 451, 453, 454, 461 and 464 of Title 28 of the United

States Code enacting the Selective Training and Service Act of 1940 which is entirely silent on the denial of the writ of habeas corpus? Accordingly there is present a substantial question concerning the construction of 28 U. S. C. s. 451-464 and 50 U. S. C. s. 301-318. A consideration of these sections and titles also involves a construction of Clause 2, Section 9 of Article I of the Constitution.

The action of the courts below in construing the above statutes and constitutional provisions so as to deny to petitioner his inalienable right to the writ of habeas corpus is a decision on an "important question of federal law which has not been, but should be, settled by this court". This is demonstrated by the fact that the judges of the court below divided 3 to 2 on the problem. The dissenting opinion which is incorporated herein by reference is another ground for the granting of the writ in this case. Weight of authority is added to the views of the two dissenting judges by the expression of identical views by two district judges in the cases styled *Ex parte Stewart*, 47 F. Supp. 410, and *Goodwin v. Rowe*, 49 F. Supp. 703.

The courts below have "decided a federal question in a way probably in conflict with applicable decisions of this court" in reference to the need and availability of the writ of habeas corpus under the unusual and extraordinary facts and circumstances of this case. This case falls within the exception to the rule denying the writ before trial and appeal from a conviction. The denial of the writ here conflicts with the principles announced in *Ex parte Royall*, 117 U. S. 241; *Covell v. Heyman*, 111 U. S. 176, 182; *In re Burrus*, 136 U. S. 586, 590-592; *In re Neagle*, 135 U. S. 1; *Ex parte Large*,

18 Wall. 163; *In re Medley*, 134 U. S. 160; *In re Loney*, 134 U. S. 372; *In re Wildenhuis*, 120 U. S. 1; *Ohio v. Thomas*, 173 U. S. 276, 284; *Baske v. Comingore*, 177 U. S. 459, 466.

The principles announced by the court below and the conclusion reached conflict with conclusions of this court concerning availability of the writ of habeas corpus in the cases of *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103, 113; *Escoe v. Zerbst*, 295 U. S. 490; *Johnson v. Zerbst*, 304 U. S. 458; *Bowen v. Johnson*, 306 U. S. 19; *Holiday v. Johnson*, 313 U. S. 342; *Waley v. Johnston*, 316 U. S. 101, 104; *Pyle v. Kansas*, 317 U. S. 213; *Walker v. Johnston*, 312 U. S. 275, and *Smith v. O'Grady*, 312 U. S. 329.

The line of decisions of this court¹ holding that the writ of habeas corpus is not available in advance of trial to release one threatened with an illegal and unconstitutional prosecution do not apply because the holdings in those cases are based upon the proposition that the defendant has the right to urge the same contentions in defense to the indictment and upon appeal, which remedies must first be pursued before resorting to the writ of habeas corpus. The decision of this court in *Falbo v. United States* abrogates all possibilities of this defense to the indictment or urging it upon appeal and *ipso facto* removes the grounds for denial of the writ of habeas corpus. It cannot be said that petitioner may urge the invalidity of the order in defense to the indictment or on appeal from the conviction so as to deny the writ in advance of trial.

Since petitioner was required to undergo severe

¹ *Johnson v. Hoy*, 227 U. S. 245; *Glasgow v. Moyer*, 225 U. S. 420; *Jones v. Perkins*, 245 U. S. 390; *In re Langaster*, 137 U. S. 393; *Riggins v. United States*, 199 U. S. 547, 551.

pains and penalties and certain loss of liberty in claiming his exemption by either reporting for induction or failing to report for induction without an opportunity of adequately protecting his interest and determining his legal liability in advance of compliance or noncompliance with the order, the court below in denying the writ decided a federal question in a way which conflicts with holdings of this court in the cases of *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 335-337; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196, 206-208; and *Ex parte Young*, 209 U. S. 123.

In so holding that the writ of habeas corpus is not as efficacious to protect the liberty of the people as is the writ of injunction to protect the property of the people, the court below has ruled in conflict with applicable decisions of this court in the cases of *Lloyd Sabando v. Etling*, 287 U. S. 329; *Gonzales v. Williams*, 192 U. S. 1; *Kessler v. Strecker*, 307 U. S. 22, at pages 34-35; *Ng Fung Ho v. White*, 259 U. S. 276. In denying the writ of habeas corpus because petitioner refused to report for induction the courts below ruled in conflict with this court's statement: "she was not obliged to resort to the Superintendent or the Secretary." (*Gonzales v. Williams*, 192 U. S. 1, 15) Compare discussion of Mr. Justice Stone in *McNally v. Hill*, 293 U. S. 131, 135-139; and that in *Ex parte Yerger*, 8 Wall. 85 at pages 95-103.

In denying judicial review upon petition for writ of habeas corpus the courts below ruled contrary to *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 882; *Givings v. Zerst*, 255 U. S. 11, 20; *In re Grimley*, 137 U. S. 147.

Compare *Crowell v. Benson*, 285 U. S. 22, 58. In holding that the petitioner could not avail himself of the writ of habeas corpus until the administrative proceedings had been complied with by reporting for induction as a condition precedent to judicial review, the courts below penalized the petitioner and unlawfully suspended the writ of habeas corpus contrary to the Constitution and contrary to the action of this court in *Ex parte Quirin*, 317 U. S. 1, where the writ was applied for and determined on this appeal prior to the termination of the court-martial trial. Although the evidence for the parties had closed there yet remained the argument of counsel and decision by the 'administrative agency'. It is noted that in the *Quirin* case this court did not require the petitioners to await compliance with the final judgment of the 'administrative agency' as condition precedent to entertaining the writ of habeas corpus. See also *Ex parte Milligan*, 4 Wall. 2.

It has been held that if prior to indictment or trial it is contended that the undisputed evidence shows that no crime has been committed by the defendant, the writ of habeas corpus will be granted to discharge the defendant and stop further proceedings. See *Horner v. United States*, 143 U. S. 570; *Tinsley v. Treat*, 205 U. S. 20; *Hyde v. Shine*, 199 U. S. 62; *Green v. Henkel*, 183 U. S. 249. So also if the prosecution is based upon a void indictment. *In re Bain*, 121 U. S. 1; *Hyde v. Shine*, 199 U. S. 62. Accordingly, it is here urged that the decision of the court below is directly in conflict with the foregoing opinions and holding of this court.

In holding that the writ of habeas corpus is not available, under the circumstances, to review the action of an administrative agency which has denied the petitioner his rights and liberty contrary to the due process

clause of the Fifth Amendment the court below ruled contrary to this court in *Crowell v. Benson*, 285 U. S. 22, at pages 56 to 57; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, at pages 50 to 52; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349.

Petitioner asserts that the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. It is submitted that this case is one calling for the exercise of this court's supervisory powers under the statute and rules of this court.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

SAM CATANZARO, JR., *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

